(3)

No. 06-797

FILED
DEC 20 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

UNITED STATES FOREST SERVICE, *et al.*,
Petitioners,
v.
EARTH ISLAND INSTITUTE, *et al.*,
and
SIERRA PACIFIC INDUSTRIES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT SIERRA PACIFIC INDUSTRIES IN SUPPORT OF PETITION

David H. Dun
David E. Martinek
Dun & Martinek LLP
2313 I Street
Eureka, CA 95501
(707) 442-3791

Thomas R. Lundquist
Counsel of Record
Steven P. Quarles
Clifton S. Elgarten
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
(202) 624-2500

Attorneys for Respondent Sierra Pacific Industries

QUESTION PRESENTED

Respondent Sierra Pacific Industries adopts the Question Presented in the Petition for a Writ of Certiorari filed by the Solicitor General.

PARTIES TO THE PROCEEDINGS

Respondent Sierra Pacific Industries adopts the statement of the Parties to the Proceedings in the Petition.

CORPORATE DISCLOSURE STATEMENT

Respondent Sierra Pacific Industries is a closely-held company and has no parent corporation. No affiliated company has issued shares of stock to the public.

TABLE OF CONTENTS

Question Presented i

Parties To The Proceedings ii

Corporate Disclosure Statement ii

Table Of Authorities iv

Statement Of The Case 1

Reasons For Granting The Petition 5

I. Irreparable Injury, Balance Of Harms, And The Public Interest 6

II. Likelihood Of Success On The Merits 13

Conclusion 23

TABLE OF AUTHORITIES

Cases:

Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987) 7, 9

Auer v. Robbins, 519 U.S. 452 (1997) 18

Brock v. Pierce County, 476 U.S. 253 (1986) 18

Cascadia Wildlands Project v. Conroy, 159 Fed. Appx. 769 (9th Cir. 2005) 20

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 14, 23

Cronin v. U.S. Department of Agriculture, 919 F.2d 439 (7th Cir. 1990) 14

Department of Transp. v. Public Citizen, 541 U.S. 752 (2004) 14, 15

Earth Island Institute v. U.S. Forest Serv., 351 F.3d 1291 (9th Cir. 2003) 5, 6, 8, 10, 15, 19, 22

eBay v. MercExchange, L.L.C., 126 S. Ct. 1837 (2006) 7

Entergy v. State of Nebraska, 241 F.3d 979 (8th Cir. 2001) 21

Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985) 14, 23

Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv., 408 F. Supp. 2d 916 (N.D. Cal. 2006) 12

Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv., 143 Fed. Appx. 25 (9th Cir. 2005) 20

Forest Watch v. U.S. Forest Serv., 410 F.3d 115 (2d Cir. 2005) 18

Hortonville Joint School District v. Hortonville Edu. Ass'n, 426 U.S. 482 (1976) 22

Lands Council v. Kimbell, 114 Fed. Appx. 917 (9th Cir. 2004) 20

Marshall v. Jerrico, Inc., 446 U.S. 238 (1982) 22

Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004) 17

Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998) 21

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 9

Seattle Audubon Society v. Moseley, 80 F.3d 1401 (9th Cir. 1996) 9

Sierra Club v. Espy, 38 F.3d 792 (5th Cir. 1994) 8, 9

Sierra Club v. Robertson, 784 F. Supp. 593 (W.D. Ark. 1991), *aff'd*, 28 F.3d 753 (8th Cir. 1994) 8

Sierra Club v. Thomas, 105 F.3d 248 (6th Cir. 1997) 21

Swanson v. U.S. Forest Serv., 87 F.3d 339 (9th Cir. 1996) 17

United States v. City and County of San Francisco, 310 U.S. 16 (1940) 22

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 18

United States v. New Mexico, 438 U.S. 696 (1978) 2

Utah Envtl. Congress v. Bosworth, 443 F.3d 732 (10th Cir. 2006) 18

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) 7

Wildwest Institute v. Bull, __ F.3d __, 2006 WL 3489609 (9th Cir. 2006) 10, 20

Constitution and Statutes:

U.S. Constitution, Art. IV, § 3 22
Administrative Procedure Act,
5 U.S.C. 706 13
Healthy Forests Restoration Act,
117 Stat. 1887 (2003), 16 U.S.C. 6511-91 11
National Forest Management Act,
16 U.S.C. 1604, 1611 ..... 2, 9
16 U.S.C. 472a(h), 576-76d,
1601(d), 1606a 2, 12, 21
16 U.S.C. 475 ..... 2, 9
16 U.S.C. 528-31 2

Rules and Regulatory Preambles:

36 C.F.R. Part 219 18
36 C.F.R. 219.19 (1999) 17
65 Fed. Reg. 67,514 (Nov. 9, 2000) 18
70 Fed. Reg. 1023 (Jan. 5, 2005) 18

Miscellaneous:

Healthy Forests - An Initiative for Wildfire Prevention and Stronger Communities (White House 2002) 11

STATEMENT OF THE CASE

Sierra Pacific Industries ("Sierra Pacific") supports the Petition for a Writ of Certiorari sought by the Federal Defendants-Petitioners. Per Rule 12.6, this Response provides additional reasons for accepting review and supplemental information pertinent to the Court's decision.

1. "In October 2004, two substantial fires burned portions of the Eldorado National Forest." App. 3a. The Freds Fire Restoration Project and Power Fire Restoration Project (the "Projects"):

> were designed to restore portions of the fire-ravaged landscape . . . . 1) to reduce long-term fuel loading in order to reduce future fire severity . . . ; 2) to improve road drainage and establish effective ground cover in severely burned areas to alleviate erosion . . . ; 3) to remove certain dead trees while they retain economic value; and 4) to reduce safety hazards . . . from trees falling in the future.

App. 65a. The Projects are environmentally sensitive. The Power Project permits:

> timber harvest on some 5574 acres of the [over 13,000] total acre[s] burned by the fire . . . . The project incorporates snag (dead tree) retention areas . . . , creates no harvest zones along perennial streams, and calls for the preservation of additional dead trees in other harvest areas . . . to accommodate wildlife dependent on such habitat. Tree harvest would be accomplished using skyline and helicopter methods on steeper slopes to minimize soil impacts.

App. 65a; *see* App. 81a-91a, 115a-127a.

2. Sierra Pacific is the timber contractor chosen by the U.S. Forest Service to conduct the timber salvage associated

with the Fire Restoration Projects. App. 6a-7a. Sierra Pacific was granted Defendant-Intervenor status by a district court order filed October 14, 2005 (docket entry 51).

3. Timely harvesting of dying trees and some trees that might live serves multiple objectives. First, by placing the renewable timber resource to productive uses, this provides forest products to American consumers. This furthers a primary purpose for national forest reservations: "to furnish a continuous supply of timber for the use . . . of citizens of the United States." 16 U.S.C. 475; *United States v. New Mexico*, 438 U.S. 696, 707-15 (1978); *see* 16 U.S.C. 528-31, 1604(e), and 1611(b).

Second and significantly, the timber revenues provide funding for the Forest Service to conduct environmental remediation after a wildfire (e.g., reforestation to reduce erosion). App. 77a, 85a-91a, 115a-127a. Congress created this funding mechanism in 16 U.S.C. 472a(h), 576-76d, 1601(d), and 1606a.

Third, by harvesting some trees, this: (1) reduces fuel loading and the risk of future stand-replacing wildfires; (2) reduces the risk of later tree losses from insect infestations and diseases that attack stressed trees; and (3) eliminates hazard trees that create public safety issues. *See generally* App. 65a, 77a-78a, 81a-94a; 115a-130a.

4. District Judge Morrison C. England, Jr. denied a preliminary injunction against the Freds and Power Projects on August 25, 2005. App. 63a-78a. The opinion concludes that Plaintiffs Earth Island Institute *et al.* ("Earth Island") did not "demonstrate a significant threat of irreparable injury," as needed to qualify for a preliminary injunction. App. 67a, 71a, 73a, 74a, 77a-78a. Further, the district court found Earth Island had a low likelihood of merits success on its

procedural claims under the National Environmental Policy Act and National Forest Management Act. App. 69a-77a. Finally, the district court found that the public interest and balance of harms did not support an injunction, in light of the Projects' forest restoration benefits and the procedural nature of Earth Island's claims. App. 71a, 73a-74a, 76a-78a.

Briefing was expedited at both the district court and appellate levels.[1]

5. On an interlocutory appeal, one Ninth Circuit panel denied an emergency motion for an injunction pending appeal. App. 62a.

A separate Ninth Circuit merits panel saw the case differently from the motions panel and District Judge England. The merits panel reversed the district court's rulings on each of the preliminary injunction factors, and directed issuance of an injunction. App. 1a-58a.

a. On irreparable injury, the panel found "the district court applied an erroneous legal standard" in concluding that the plaintiff must show a "significant threat of irreparable injury." App. 13a-16a. The panel reasoned that "mere possibility of irreparable harm" is sufficient if plaintiff has a strong likelihood of merits success. App. 15a.

Later, the panel found that the "cutting of trees that would otherwise survive" and that might provide wildlife habitat satisfied a "possibility of irreparable injury" test.

---

[1] The Complaint was filed on August 11, 2005, and temporary restraining order and preliminary injunction briefing were completed by August 24. *See* district court docket entries 1-43. The circuit court ordered simultaneous briefing. App. 62a. That meant Defendants-Appellees had no opportunity to respond to the appellate arguments of Plaintiffs-Appellants.

App. 54a-55a. The court below seemed to presume that environmental change is irreparable.

b. The panel reversed the district court's ruling that the Forest Service was likely to prevail on the merits. The panel did so by engaging in an exceptionally detailed examination of dueling extra-record litigation declarations. App. 21a-40a (Royce versus Smith, Rhodes versus TenPas, Bond versus Loffland). Earth Island had submitted declarations to support a preliminary injunction. While Federal Defendants objected to the declarations (App. 22a), they also filed rebuttal declarations as a precaution.

Most prominently, the panel evaluated the extra-record Royce and Smith Declarations over numerous pages. The panel ultimately decided the title of a Table in the environmental impact statements ("EISs") prepared on the Projects was "misleading." App. 21a-33a. Table 3-6 describes the predicted mortality of trees with a certain percentage or greater of crown scorch.

The panel thought (mistakenly, *see* pages 15-17, below) that a higher percentage of the marked, scorched trees to be harvested would survive than the Forest Service predicted. App. 25a-33a. That led the panel to conclude there would be "excessive logging" of trees that would survive, which might adversely affect the California spotted owl in ways "not adequately analyzed in this FEISs." App. 38a, 44a-45a.

c. The panel also reversed on the balance of harms and public interest factors. The panel cited short-term preservation interests, and did not consider other components of the public interest. App. 54a-55a.

d. The panel directed the district court to fashion injunctive relief "consistent with this opinion." App. 57a.

6. Judge Noonan's concurrence strongly suggests that, because statutes allow use of some timber revenues to fund reforestation efforts, the Forest Service is a "biased adjudicator," its timber sale decisions are "nullit[ies]," and the agency should not receive deference. App. 57a. This reiterated a view Judge Noonan stated in another reversal of a denial of a preliminary injunction against a different post-fire project. *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1309-10 (9th Cir. 2003). The end of the panel majority opinion aligns the majority with some of Judge Noonan's views:

> It has not escaped our notice that the USFS has a substantial financial interest in the harvesting of timber . . . . USFS appears to have been more interested in harvesting timber than in complying with our environmental laws.

App. 56a.

7. Both Federal Defendants and Sierra Pacific sought rehearing, which was denied. App. 146a-147a. Those petitions featured the same questions presented here.

8. On remand, District Judge England preliminarily enjoined the Forest Service and Sierra Pacific from all logging operations within the Freds and Power Project areas (except for already-felled trees and hazard trees) in an August 31, 2006 order. Docket entry 77. The injunction affects millions of board-feet of timber, having a contract price of over $4 million. Docket entry 84 at 5.

REASONS FOR GRANTING THE PETITION

We share the Solicitor General's assessment that the decision below warrants review by this Court. The Petition presents important, recurring questions on the appropriate standards for preliminary injunctive relief and for review of

federal agency actions. The opinion below contravenes this Court's precedents and conflicts with the law of other circuits.

I. Irreparable Injury, Balance Of Harms, And The Public Interest

1. The irreparable injury test in the opinion below ("mere possibility of irreparable injury," App. 15a) warrants this Court's scrutiny.[2] That test has broad significance, and cannot be reconciled with this Court's guidance.

Determining the appropriate level of certainty of irreparable injury required to qualify for an extraordinary preliminary injunction is a recurring question of great significance to both the public sector and the private sector. Succinctly stated: a low, easily-met irreparable injury test means that a greater percentage of important federal programs and productive private activities will be preliminarily enjoined based on speculative, minor risks of irreparable injury.

For example, land-use cases normally involve some change in existing environmental conditions. If a "mere possibility" of irreparable injury is sufficient and the full public interest is not considered, as in the panel opinion, the

---

[2] The panel opinion relies on an earlier *Earth Island* decision that involved a "very similar set of facts." App. 14a. That split decision reversed the denial of a preliminary injunction on another fire restoration project, and also employed a "possibility of irreparable injury" test. *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1298-99 (9th Cir. 2003). There, Judge Clifton dissented. He believed the panel majority had set the preliminary injunction bar too low by allowing a "purported injury which is only theoretical or speculative" to suffice for irreparable injury. 351 F.3d at 1311 (dissent); *see id.* at 1310-15.

Ninth Circuit's standard for a preliminary injunction becomes "akin to no standard at all." Pet. at 21.

The Ninth Circuit's sliding-scale test allows a preliminary injunction if, based on a quick look at a partial record, plaintiff is likely to prevail on the merits and there is a "mere possibility of irreparable injury." That test is inconsistent with this Court's controlling precedents. *See* Pet. at 20-21. Under the Court's teachings, "the basis for injunctive relief in the federal courts has always been irreparable injury" – an injunction is an "extraordinary remedy" which does not issue for "trifling" injuries. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). This "Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows" for a violation of law. e*Bay v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1840 (2006). In *eBay*, the Court overruled lower court case law providing for automatic injunctions in patent disputes. The Court found that the "well-established" four-factor test applies, and it includes the requirement that a "plaintiff must demonstrate: (1) that is has suffered an irreparable injury." 126 S. Ct. at 1839.

Moreover, the court below basically resurrected a presumption that environmental impacts are irreparable (here, that cutting any live trees in a national forest creates a possibility of irreparable injury to wildlife). App. 54a-55a; *see* Pet. at 21. This Court unanimously reversed the Ninth Circuit's use of such a presumption in *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 544-46 (1987). We fail to see why the salvage harvest of dead and dying trees – along with the harvest of a some trees that might live, where the

trees are a renewable resource and where forests inevitably change – is an irreparable injury.[3]

Further, as shown in the Petition (at 22-25), the "mere possibility of irreparable injury" test for a preliminary injunction is contrary to the law of many other circuits.

In sum, the court below addressed the irreparable injury prerequisite in a manner that contravenes this Court's precedents and that reinforces circuit conflicts. The probability of irreparable injury that should be required as a prerequisite to preliminary injunctive relief is a recurring question of great significance. Accordingly, the Petition warrants review under the considerations stated in Rule 10.

2. The opinion below also is in tension with this Court's precedents on the balance of harms and public interest factors for an extraordinary preliminary injunction. *See* Pet. at 26-28. The panel elevated short-term preservation over other components of the public interest. The panel stated the "preservation of our environment, as required by NEPA and the NFMA, is clearly in the public interest." App. 55a. Yet, this Court has found that the National Environmental Policy Act ("NEPA") is procedural

---

[3] "Some trees will be cut; new trees will grow in their place"; accordingly, "plaintiffs' injury is not irreparable" in the multiple-use context of national forest management. *Sierra Club v. Robertson*, 784 F. Supp. 593, 599 (W.D. Ark. 1991), *aff'd*, 28 F.3d 753 (8th Cir. 1994); *see Sierra Club v. Espy*, 38 F.3d 792, 800-02 (5th Cir. 1994) (dynamic forested environments change, with or without human intervention).

As Judge Clifton stated in dissenting against the similar overruling of a preliminary injunction denial in another case, it was the "fire put that [spotted owl] habitat at grave risk." *Earth Island*, 351 F.3d at 1312. It is "unlikely that permitting the reforestation plan to go forward would result in irreparable injury" to owls. *Id.*

only, and does not elevate environmental concerns over other public interest elements. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-53 (1989).

The National Forest Management Act ("NFMA") also does not mandate "preservation of our environment." *See Sierra Club v. Espy*, 38 F.3d 792, 800 (5th Cir. 1994). The NFMA's multiple-use mandate encourages salvage logging (16 U.S.C. 1604(k) and 1611(b)), and contemplates that the sustained-yield harvesting of live trees will be carried out.[4] National forests also should be managed to reduce long-term risks to forest health and to protect watersheds through erosion control. 16 U.S.C. 475, 551. The Restoration Projects had benefits in all these areas. *See* App. at 81a-91a, 115a-127a.

The Ninth Circuit has again erred by not considering other components of the public interest. *Amoco Prod.*, 480 U.S. at 545-46 (Congress defines the public interest in the statutes it enacts; Ninth Circuit erred by not considering the energy development interest in the Outer Continental Shelf Lands Act). Here, the other components of the public interest include the environmental benefits of the Restoration Projects and the timber use benefits reflected in statutes. *See* Pet. at 26-28.

The district court, in contrast, considered all the relevant aspects of the balance of harms and the public interest. It found that a preliminary injunction was not in the public interest because: (1) the "fuel reduction" protects

---

[4] 16 U.S.C. 1604(e) and (g)(3)(F)(v), and (m), 1611; *see id.* at §§ 475, 528-31, *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996) (multiple-use mandate requires compromises); Pet. at 28 n.12.

"communities from the threat of future devastating fire"; (2) the salvage logging revenues will support "reforestation activities"; (3) some logging protects the public "from falling trees"; and (4) "much of the charred landscape . . . (to which Plaintiffs assign considerable environmental value) will remain untreated." App. 77a-78a. Since that balance is reasonable, it should not have been overturned.[5]

3. The timely achievement of forest health treatments does have public interest significance.

> About 190 million acres of federal forests . . . in the lower 48 states face high risks of catastrophic fire due to deteriorating ecosystem health and drought. . . . Where 25 to 35 trees once grew on each acre of forest, now more than 500 trees are crowded together in unhealthy conditions. Drought conditions coupled with years of fuel buildup from fire suppression and reduced thinning make these lands vulnerable to intense and environmentally destructive fires.

---

[5] As Judge Clifton put in his dissent in an earlier *Earth Island* case, "enjoining the program would result in a loss in value from deteriorating timber – and thus a reduction in the money available to fund the reforestation plan – and would delay implementation of replanting efforts." 351 F.3d at 1313. The majority opinion "fails to explain why preservation of a burned-out forest and postponement of rehabilitation plans serves the public interest." *Id.*

Recently, another Ninth Circuit panel *did* consider the "'short and long-term effects' of both action and inaction" on tree stands being damaged by a beetle epidemic. The panel found the district court did not err in concluding that a balance of the hardships tilted against a preliminary injunction. *Wildwest Inst. v. Bull*, __ F.3d __, 2006 WL 3489609 at *4 (9th Cir. Nov. 29, 2006) (relying in part on the loss "in revenue from timber sales if the MEF Project were enjoined").

Healthy Forests – An Initiative for Wildfire Prevention and Stronger Communities 4 (White House 2002) (available at *http://www.whitehouse.gov/infocus/healthyforests/Healthy_Forests_v2.pdf*). This concern produced the President's Healthy Forests Initiative and the Healthy Forests Restoration Act.[6] That Initiative seeks to reduce the risks of catastrophic wildfires to local communities by thinning forests to reduce unnaturally-high fuel loads, and by restoring fire-damaged ecosystems.

An easily-met preliminary injunction test has pernicious effects as applied to post-fire salvage logging and the funding of forest restoration efforts. The economic value of scorched trees deteriorates as logs rot and decay.

> The first year after a fire, the value of trees removed will cover the cost of their removal and associated fuel treatment and can be used to pay for restoration work. Opportunities for restoration work that can be funded by this timber value include reducing erosion from roads, treatment of fuels, future restoration, and wildlife and watershed improvement projects. By the second or third year after a fire, the value and volume loss [as trees deteriorate] may preclude any economic return, thereby jeopardizing the availability of funds for restoration.

App. 84a; *see* App. 119a-126a; Pet. at 23, 27.[7]

---

[6] *See* *http://www.whitehouse.gov/infocus/healthyforests/*; *http://www.fs.fed.us/projects/hfi/*. The Healthy Forests Restoration Act is codified at 117 Stat. 1887 (2003), 16 U.S.C. 6511-91.

[7] Here, some "timber not yet harvested retains economic value." Pet. at 13. This is true because: (1) some trees scorched in the 2004 fires will not die for several years, and death is when deterioration in value escalates; and (2) the core of larger trees decays more slowly and retains value longer. *See* App. 119a, 125a.

In such time-sensitive situations, the denial or grant of a preliminary injunction has greater consequences. In many situations, an early grant of a preliminary injunction leads to cancellation of the salvage logging and reforestation effort, as it is no longer economically feasible. *See Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 408 F. Supp. 2d 916, 917-18 (N.D. Cal. 2006); App. 83a-84a, 89a-90a. Even where the preliminary injunction comes after some salvage logging (the fact pattern here), the Forest Service receives fewer revenues under the timber contract.

The results of a preliminary injunction include no funding or reduced funding for forest restoration after a major disturbance. The removal of dead and stressed trees is compromised, as is the ability to reduce long-term risks of fire, tree diseases, and insect attacks. Continued erosion of soils and reduced water quality also result if replanting of vegetation cannot be funded. E.g., App. 81a-91a, 119a-126a. For sound reasons such as these, Congress has authorized the use of national forest timber revenues to offset the costs of reforestation. 16 U.S.C. 472a(h), 576-76d, 1601(d), 1606a.

In addition to the perverse environmental effects of preliminary injunctions in timber salvage situations, such injunctions, of course, have adverse economic impacts. Reduced salvage harvesting has adverse employment effects, and results in a lower revenue base for local economies. A preliminary injunction means that higher-value timber is not available for productive human uses. If the timber contract price is not automatically adjusted for the time-dependent value of the damaged timber, preliminary injunctions can produce litigation between the federal and private parties to the timber contract over who bears the cost of the diminished value of the contract. Further, if preliminary injunctions are perceived to be a high risk, bidders may translate that risk

into lower bids: (1) to account for the uncertainty over when timber with a deteriorating economic value can be harvested; and (2) as increased costs may be incurred in defending the timber contract. This raises the costs of federal programs to agencies and the public alike.

Moreover, if preliminary injunctions become the norm, many companies can be expected to exit the high-risk area of timber contracting with the Forest Service. Yet, the Forest Service has recognized that, in order to accomplish forest health objectives that are in the public interest (such as timber thinning near communities to reduce risks of catastrophic wildfires), the agency needs to keep a viable timber industry infrastructure in California.[8] Otherwise, who will harvest trees and brush efficiently, maintain and create markets for biomass, and provide some revenues to offset the costs of forest health treatments?

Thus, even looking solely at the timber salvage and reforestation context, the preliminary injunction questions have a level of significance that warrant this Court's review.

II. Likelihood Of Success On The Merits

The panel also erred in reversing on the likelihood of merits success in a manner having broad significance. *See* Pet. at 14-19.

1. The Administrative Procedure Act ("APA") provides for deferential review of agency action on the administrative "record" (5 U.S.C. 706), not judicial

---

[8] *See* the Sierra Framework documents available at *http://www.fs.fed.us/r5/snfpa/final-seis/rod/pdfs/snfpa-rod.pdf* (pages 4 and 17), *http://www.fs.fed.us/r5/snfpa/final-seis/vol1/pdfs/snfpa-vol1.pdf* (pages 28-29, 174-77).

factfinding and *de novo* review. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16, 419 (1971). As the Petition develops (at 14-18), the decision below is inconsistent with those principles. For example, the court below improperly reviewed the merits by assessing extra-record "litigation affidavits." *Overton Park*, 401 U.S. at 419; *see Lorion*, 470 U.S. at 743-44.

Plaintiffs and some of their experts (e.g., Dr. Royce) had submitted comments on the draft EISs. Earth Island should have been limited to those comments – it cannot ambush the agency in court with post-decisional declarations. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764-65 (2004); Pet. at 18 n.6. As Judge Posner has phrased it, in APA review,

> the district court is a reviewing court, like this court; it does not take evidence. . . . [A]gencies deal with technical questions, and it is imprudent for generalist judges . . . to consider testimonial and documentary evidence bearing on those questions unless the evidence has first been presented to and considered by the agency.

Cronin v. U.S. Dep't of Agric., 919 F.2d 439, 443-44 (7th Cir. 1990).

Plaintiffs have considerable advantages in preliminary injunction proceedings. They can prepare briefs and affidavits ahead of time and spring them on defendants at inopportune times. Where the timing of a preliminary injunction motion does not allow Federal Defendants to assemble the administrative record, some courts may decide the motion based on litigation affidavits and court testimony, and may slip back into their common role as *de novo* factfinder. That seemed to happen here. The panel reached

out to decide the merits and the equities in an interlocutory appeal. The panel did so without the full administrative record, and without an adequate opportunity for Appellees to respond to Earth Island's arguments. *See* note 1.

2. On NEPA compliance, the panel engaging in virtual *de novo* review of the competing declarations (Royce versus Smith), rather than deferentially reviewing the EISs under a "rule of reason." *Public Citizen*, 541 U.S. at 767. In that prohibited *de novo* review, the panel concluded that the tree-mortality data in Table 3-6 of the EISs is "misleading." App. 32a-33a.

That conclusion is mistaken. The tell-tale signs include the disagreement of the district court (App. 69a-71a) and in Judge Noonan's concurrence. App. 57a ("It is more difficult for this court to . . . be confident in its discrimination between expert opinions"; "I cannot say that I am sure as to Earth Island's probable success"). Further, in an earlier suit, another Ninth Circuit panel had found no fault with the same "tree mortality" data. *Earth Island*, 351 F.3d at 1301-02 (the EIS's treatment of "Smith's criteria for determining tree mortality" was reasonable, though it was opposed by "Dr. Ed Royce").

Table 3-6 describes the predicted mortality of a group of trees that meet the minimum marking guideline, where many trees have more than the minimum degree of crown scorch and are more likely to die. Dr. Royce confused the EIS's predicted mortality of that *group of trees* (a weighted average) with is focus on the likelihood that a *single tree* with only the *minimum* percentage of crown scorch would die. The panel majority may have repeated this error, and

certainly read too much into a sentence in Ms. Smith's Declaration.[9]

---

[9] A prior post-fire study provided information on the: (1) percentages of tree crown scorch encountered in the field; and (2) the observed tree mortality rate for trees with a particular degree of crown scorch. *See* C.A.E.R., Tab 9 at 75-77 (Power EIS) and Tab L (Smith Decl.); Hood, Smith & Cluck, *Delayed Conifer Tree Mortality in California* (available at *http://www.fs.fed.us/forestmanagement/infocenter/nsw2005/documents/15_DelayedConiferMortality-Hood.pdf*). The Forest Service used this information to develop the minimum percentage of crown scorch for each tree species needed to qualify for marking and harvesting by either tractor logging or helicopter logging. All yellow pines (ponderosa, jeffrey, and sugar pines) whose crown scorch was 75% or greater could be marked for harvest. C.A.E.R., Tab A (the marking guideline described in Appendix F of the Power EIS). This means that some trees with 75% crown scorch would be harvested (and the data suggests such a tree has a 90% probability of dying), some trees with 90% crown scorch would be salvaged (which have a 99% chance of dying), etc. *See* C.A.E.R., Tab L (Smith Decl., particularly at Attachment A).

Hence, use of a 75% *minimum* crown scorch standard for marking, in on-the-ground application to trees with a range of crown scorch of 75% to 100% means that 96% of the yellow pines to be cut would die anyway (and that only 51% of the uncut trees with a lesser degree of crown scorch would survive). This is what Table 3-6 and the accompanying EIS text accurately disclose. *See* C.A.E.R., Tab 9 at 75-77 (Power EIS) (also available at *http://www.fs.fed.us/r5/eldorado/documents/power/feis_power_ch3.pdf*); App. 20a-21a, 91a-94a. Earth Island's expert (Dr. Royce), and perhaps the panel, misinterpreted the Table. They read the Table as implying that a yellow pine with a 75% crown scorch had a 96% chance of dying soon and thought that figure was too high based on other studies. *See* App. 22a-28a.

Moreover, the panel erred in reading too much into a sentence in Ms. Smith's declaration. *See* App. 25a-26a, 28a, 32a. The panel found a NEPA defect based on a sentence (concerning the accuracy of the marking guideline model) that does not appear in the EISs. Table 3-6 does not just describe the accuracy of the minimum

(continued....)

Moreover, even assuming *arguendo* the panel were correct, it is inconsistent with NEPA's "rule of reason" to find an entire EIS deficient based on an allegedly-misleading title of a single Table in an EIS. The panel "fly-specked" adequate EISs. *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343-44 (9th Cir. 1996).

3. With respect to the NFMA, the panel concluded the Forest Service had not complied with self-created duties regarding monitoring of wildlife or wildlife habitat conditions. App. 46a-54a. Under deferential APA principles, the agency's view that it had complied with its own forest plans and rules should have been controlling.

The panel's conclusion was based, in part, on the monitoring frequency anticipated by forest plans. That analysis is in tension with a precedent of this Court. *See* Pet. at 18-19. Such "monitoring" statements in federal land use plans normally are "projections" on what the agency would like to do if it obtains sufficient "appropriat[ions]" – they are "not a legally binding commitment enforceable" in court. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 69-72 (2004).

The panel also arguably applied the 1982 implementing rules to the August 2005 Freds and Power Projects, and found wildlife monitoring violations under former 36 C.F.R. 219.19 (1999). App. 47a, 53a. Yet, the 1982 rules ceased to have legal effect when they were deleted in 2000 – the January 2005-adopted forest planning rules apply to the

---

(continued) . . .

marking guideline in correctly predicting tree mortality. It also describes the probability of mortality of a group of yellow pines with a crown scorch of 75% to 100%.

August 2005 Projects.[10] The Forest Service's interpretation of its own rules should be "controlling" under *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997). The panel's opinion reinforces a circuit split on which NFMA rules apply.[11]

Further, as the Petition describes (at 19), the forest plans and rules do not make a certain quality of forest-wide wildlife information a prerequisite to the Forest Service's ability to conduct site-specific projects. More generally, disputes over the quantum of wildlife information do not justify enjoining the environmentally-sensitive Restoration Projects. Pet. at 25; App. 73a-77a (district court's analysis). A less-drastic and curative remedy would be to enjoin the agency to conduct the level of required wildlife monitoring. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993); *Brock v. Pierce County*, 476 U.S. 253, 260 (1986).

4. Disputes over NEPA and NFMA compliance on proposed timber sales recur with considerable frequency in the Ninth Circuit. For example, Westlaw research located 15 Ninth Circuit opinions on such timber harvesting matters in 2005 and 2006 alone.

The *Earth Island* precedents can be expected to increase the ability of plaintiffs to enjoin timber harvesting through

---

[10] The 1982-adopted version of 36 C.F.R. Part 219 was deleted when Forest Service adopted successor forest planning rules at 65 Fed. Reg. 67,514 (Nov. 9, 2000), with a Nov. 9 effective date. The 2000 forest planning rules, in turn, were succeeded by new rules at 70 Fed. Reg. 1023 (Jan. 5. 2005), with a Jan. 5 effective date.

[11] Courts outside the Ninth Circuit have found former § 219.19 inapplicable to post-2000 projects. *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 744-47 (10th Cir. 2006); *Forest Watch v. U.S. Forest Serv.*, 410 F.3d 115, 118 (2d Cir. 2005).

court actions. This, in turn, compromises the Forest Service's ability to accomplish multiple uses like timber production, as well as the agency's ability to conduct forest health initiatives. *See* pages 10-13, above. Thus, the Petition's question on the likelihood of merits success has a level of significance that warrants this Court's scrutiny. *See* Pet. at 27-29.

5. As discussed above and in the Petition, the panel's across-the-board reversal of the district court, and its essentially *de novo* review of competing expert declarations, are highly unusual. In enjoining the time-sensitive salvaging of timber, the panel failed to accord weight to the Forest Service's balancing of competing public interests and to district court's assessment of the equities. The question naturally arises: How could the panel commit so many fundamental errors? The end of the majority opinion and Judge Noonan's concurrence leave little doubt that this occurred because the panel simply did not trust the Forest Service, given its supposed financial interest in the outcome of this case.[12]

---

[12] The panel majority highlighted that the Forest Service "has a substantial financial interest in the harvesting of timber" and suggested this interest has repeatedly compromised compliance "with our environmental laws." App. 56a. Judge Noonan's concurrence strongly suggests the statutorily-authorized use of timber revenues to fund reforestation "biased" the agency in a manner negating APA deference. App. 57a; *see Earth Island*, 351 F.3d at 1309-10 (Judge Noonan's further explication of his position). *See* page 5, above.

The panel further notes a "disturbing trend in the USFS's recent timber-harvesting and timber-sale activities." App. 56a. The majority opinion then cites several Ninth Circuit opinions that created extensive NEPA and NFMA duties, found violations of those duties, and enjoined timber sales. Unmentioned are a series of unpublished opinions, where other panels affirmed denials of preliminary

(continued....)

This mindset plausibly explains why the panel, after citing well-established principles requiring deference to the agency under the APA review, in practice showed almost no deference on even the most technical matters (e.g., tree mortality) and compliance with the Forest Service's own forest plans and rules (e.g., wildlife monitoring). *See* App. 18a-54a. Proceeding from an underlying assumption that the Forest Service is institutionally biased, the panel felt free to substitute its judgment for that of the agency on technical, legal, and policy matters. One further illustration: while the Forest Service believed that it had to balance multiple considerations, the panel substituted a policy judgment in favor of "preservation." App. 55a; *see* Pet. at 27-28.

The majority's tangential comment and the opinion of Judge Noonan each adverted to the agency's supposed financial bias. There is no doubt that the agency's supposed bias was a motivating force in connection with the decision, even though the panel did not feel compelled to address the point expressly. Under the porous approach to the merits adopted by the Ninth Circuit, a court can freely substitute its own conclusions for that of the agency, while leaving the court's actual motivating concerns about agency bias as a mere undertone. This approach highlights the broad departure from proper practice reflected in the decision

---

(continued) . . .

injunctions against timber-related actions without delving deeply into the merits. E.g., *Cascadia Wildlands Project v. Conroy*, 159 Fed. Appx. 769 (9th Cir. 2005); *Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 143 Fed. Appx. 25 (9th Cir. 2005); *Lands Council v. Kimbell*, 114 Fed. Appx. 917 (9th Cir. 2004). And, *Earth Island* is difficult to square with deferential decisions like *Wildwest Inst. v. Bull*, __ F.3d __, 2006 WL 3489609 at *4 (9th Cir. 2006).

below. Rather than apply legal standards to the review process, the Ninth Circuit's *de novo* approach to review of agency decisionmaking allows it to embed its own broad philosophical concerns in the ultimate decision. Under basic APA principles, however, broad policy judgments are for the agency to bring to bear in its decision-making; they should have no role in judicial decision-making..

This is not the first time the charge of Forest Service bias has been raised by a Circuit Court in the course of substituting its judgment for that of the agency. A Sixth Circuit panel had earlier expressed the view that the statutes enacted by Congress "bias" the Forest Service in some remediable way in *Sierra Club v. Thomas*, 105 F.3d 248, 251-52 (6th Cir. 1997). This Court granted review in what became *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998). This Court criticized the Sixth Circuit for alleging "bias" without any "record citation" showing bias. 523 U.S. at 736-37. However, the jurisdictional ruling on ripeness in *Ohio Forestry* prevented the Court from reaching the merits of the bias allegation.

The bias issue can be expected to recur given the panel's published views. As here, the broad approach to review adopted by the Ninth Circuit virtually invites a panel to bring such unspoken (or barely mentioned) concerns to bear in judging agency action. In sum, to eliminate the taint of such an *ad hominem* attack on a federal agency, the Court can properly be mindful of this subsumed concern about "bias" in judging whether it is necessary and appropriate for the Court to exercise its certiorari authority in this case.

On the merits of the bias issue, we suggest that the reforestation funding mechanisms created by Congress (16 U.S.C. 472a(h), 576-76d, 1601(d), 1606a) simply do not render the Forest Service biased in a judicially-remediable

way and do not alter the deferential APA standards of review. This case does not concern a due process impairment of a property or liberty interest. There, the judiciary has a role to provide some checks on biased adjudicators.[13]

Outside such areas, Congress is the institution charged with deciding whether its own statutory regime biases an agency in an unacceptable way. The Constitution's Property Clause (Art. IV, § 3) gives Congress unfettered discretion over federal forest management. *United States v. City and County of San Francisco*, 310 U.S. 16, 29-30 (1940). Hence, a judge's view that Acts of Congress render an agency biased in a manner altering the review standards Congress has prescribed in the APA would pose serious separation-of-powers issues. The constitutional answer should be: Congress can establish the funding mechanism, and courts must respect it.

Congress prescribed the standards for judicial review of Forest Service (and other federal agency) actions in the

---

[13] Judge Noonan, in *Earth Island*, 351 F.3d at 1309-10, adverts to decisions sometimes finding that it violates constitutional "due process" if a financially-interested "adjudicat[or]" or, under more-forgiving standards, an agency "prosecutor," deprives a person of liberty or property. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-52 (1982) (agency's small financial interest in civil penalties did not render the agency prosecutor unconstitutionally biased). Those decisions are not apposite. The Forest Service's decision on harvesting fire-damaged timber: (1) concerns issuance of timber licenses, not a prosecution (*see* 5 U.S.C. 551); (2) did not deprive Earth Island of any constitutionally-protected property interest; and (3) did not personally enrich any Forest Service employee. *See Hortonville Joint School Dist. v. Hortonville Edu. Ass'n*, 426 U.S. 482, 491-96 (1976); *Entergy v. State of Nebraska*, 241 F.3d 979, 990-91 (8th Cir. 2001).

APA. The APA limits the "task of the reviewing court . . . to apply[ing] the appropriate APA standard of review . . . to the agency decision based on the" reasons stated in the agency's written decision. *Lorion*, 470 U.S. at 743-44. Courts cannot probe the "mental processes of" agency decisionmakers. *Overton Park*, 401 U.S. at 420. The panel majority's and Judge Noonan's approaches are inconsistent with APA review principles. Those approaches: (1) do not take at face value the reasons the agency stated for its decision in the record, but assume there are hidden reasons reflecting bias; and (2) do not accord deference to the agency, but conduct virtual *de novo* review.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

David H. Dun
David E. Martinek
Dun & Martinek LLP
2313 I Street
Eureka, CA 95501
(707) 442-3791

Thomas R. Lundquist
Counsel of Record
Steven P. Quarles
Clifton S. Elgarten
CROWELL & MORING
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
(202) 624-2500

Attorneys for Respondent Sierra Pacific Industries

DECEMBER 2006